Foo Gee Yaw v Loo Koo Biow

HIGH COURT (KOTA BHARU) — CIVIL APPEAL NO 12-5-1995
NIK HASHIM JC
11 MAY 1996

Civil Procedure *— Pleadings — Decision on pleaded issues — Judge deciding on issues not pleaded — Whether order granted should stand*

Civil Procedure *— Pleadings — Non-admission of termination of tenancy pleaded in defence — Whether amounted to a traverse — Whether sufficient denial to plaintiff's claim — Subordinate Court Rules 1980 O 14 r 19*

Landlord and Tenant *— Controlled premises — Recovery of possession — Whether tenancy lawfully determined — Whether trial judge's finding that the tenant had no intention to stay was sufficient — Whether tenant was in fact in occupation — Control of Rent Act 1966 s 16*

The defendant was a tenant of a two-storey premises which came within the purview of the Control of Rent Act 1966 ('the Act'). The plaintiff was the owner and landlord of the premises. The plaintiff claimed possession of the premises based on s 16(1)(i) of the Act alleging that the defendant had not personally occupied the said premises for many years, nor had any member of his family. The plaintiff also alleged that the defendant had sublet the premises. It was stated by the plainitff in his statement of claim stated that he had terminated the tenancy by a notice to quit. The defendant, in his statement of defence, did not admit the termination of the tenancy and averred that the notice to quit was invalid in law and of no legal effect. At the trial, the plaintiff testified that the notice to quit had been sent by his former solicitors. The notice was marked for identification but was never produced as an exhibit. The trial judge decided that the notice had terminated the tenancy and that the defendant had not denied receiving the notice to quit. The judge found that the defendant had no intention to stay at the premises. The learned judge further on his own accord proceeded to hold that the defendant was in breach of s 20(1)(a) of the Act for failing to supply the plaintiff with a statement of subletting and thus allowed the plaintiff's claim for repossession under s 16(1)(b) as well. The defendant appealed.

Held, allowing the appeal:

(1) The non-admission of the termination of the tenancy as pleaded by the defendant in his statement of defence amounted to a traverse, which was a sufficient denial of the plaintiff's claim. His traverse was specific to the notice to quit which he claimed to be invalid and of no legal effect. That being so, s 58 of the Evidence Act 1950 was not applicable to the facts of this case (see p 711F–H).

(2) The notice to quit was only shown to the plaintiff for identification while he was giving evidence and was not tendered as documentary evidence and therefore it could not be considered as a piece of evidence. To be admissible as such, it would have to be produced through the maker, the plaintiff's former solicitor. A document could not be admitted into evidence and marked as such until it was properly proved. Since the notice to quit had not been proved by the plaintiff and it had not been proved to have been served on the defendant, his tenancy was never lawfully determined by the plaintiff and therefore the plaintiff could not in law maintain any action for recovery of possession (see pp 711I–712B); *Chong Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377 and *Champion Motors (M) Ltd v Leong Siew Kwan* [1968] 2 MLJ 31 followed.

(3) The learned judge's finding that the defendant had no intention to stay at the premises was insufficient and ambiguous. He should go further and state clearly as a fact whether the defendant was in occupation of the premises or not. In the absence of a clear finding of fact by the trial count, the unshaken evidence of the defendant that he still occupied the premises for the purposes he testified could not be ignored and doubted (see pp 712I–713A); *Mercantile Bank of India (Trustees) Ltd v Ruth Nicholas* [1949] MLJ 104 followed.

(4) The learned trial judge had strayed himself on an issue which was not reflected in the pleadings or submisssions of the parties. It was not open to him to disregard the pleadings in order to reach a conclusion that he might have thought was just and proper. That being so, the order of the judge allowing the plaintiff's claim under s 16 (1)(b) of the Act could not be allowed to stand and should also be set aside (see p 713I); *Madam Goh Gok Hoon v Eusuff Brothers Sdn Bhd & Ors* [1990] 1 CLJ 1167 distinguished; *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 and *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 followed).

[Bahasa Malaysia summary

Defendan adalah penyewa satu premis dua tingkat yang berada di bawah kawalan Akta Kawalan Sewa 1966 ('Akta itu'). Plaintif adalah pemunya dan tuan rumah premis itu. Plaintif menuntut milikan premis itu berdasarkan s 16(1)(i) Akta itu mengatakan bahawa defendan sendiri, mahupun sebarang ahli keluarganya, telah tidak menghuni premis itu selama beberapa tahun. Plaintif juga mengatakan bahawa defendan telah menyewakan sebahagian premis itu kepada penyewa lain. Plaintif di dalam pernyataan tuntutan telah menyatakan bahawa dia telah menamatkan penyewaan itu melalui satu notis keluar. Defendan di dalam pernyataan pembelaannya, tidak mengaku penamatan penyewaan tersebut dan menyatakan bahawa notis keluar itu adalah tak sah dan tiada kesan di sisi undang-undang. Semasa

perbicaraan, plaintif telah memberi keterangan bahawa notis keluar itu telah dihantar oleh bekas peguamcaranya. Notis keluar telah ditandakan untuk pengecaman tetapi tidak dikemukakan sebagai satu ekshibit. Hakim perbicaraan telah memutuskan bahawa notis itu telah menamatkan penyewaan itu dan bahawa defendan tidak menafikan penerimaan notis keluar itu. Hakim mendapati bahawa defendan tidak bertujuan tinggal di premis itu. Beliau juga melalui ikhtiarnya sendiri memutuskan bahawa defendan telah melanggar s 20(1)(a) Akta itu kerana gagal membekalkan plaintif satu pernyataan penyewaan kepada penyewa lain dan oleh itu membenarkan tuntutan palintif untuk milikan di bawah s 16(1)(b) juga. Defendan merayu.

Diputuskan, membenarkan rayuan itu:

(1) Ketidakakuan penamatan penyewaan itu yang diplidkan oleh defendan di dalam pernyataan pembelaannya merupakan satu sangkalan, yang merupakan satu penafian yang mencukupi terhadap tuntutan plaintif. Sangkalan beliau adalah spesifik terhadap notis keluar itu yang dikatakan beliau adalah tak sah dan tidak mempunyai kesan undang-undang. Oleh demikian, s 58 Akta Keterangan 1950 tidak terpakai kepada fakta kes ini (lihat ms 711F–H).

(2) Notis keluar itu hanya ditunjukkan kepada plaintif untuk pengecaman semasa beliau memberi keterangan dan tidak dikemukakan sebagai keterangan dokumentasi dan oleh itu ia tidak boleh dipertimbangkan sebagai keterangan. Supaya boleh diterima sebagai keterangan, ia harus dikemukakan melalui pembuatnya, bekas peguamcara plaintif. Satu dokumen tidak boleh diterima sebagai keterangan dan ditandakan sebagainya sehingga ia telah dibuktikan sepatutnya. Oleh kerana notis keluar itu tidak dibuktikan oleh plaintif dan ia tidak dibuktikan sebagai telah disampaikan kepada defendan, penyewaan defendan tidak ditamatkan dengan sah oleh plaintif dan dengan demikian plaintif tidak boleh di sisi undang-undang membawa apa-apa tindakan untuk mendapatkan semula milikan (lihat ms 711I–712B); *Chang Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377 dan *Champion Motors (M) Ltd v Leong Siew Kwan* [1968] 2 MLJ 31 diikut.

(3) Pendapat hakim yang bijaksana bahawa defendan tidak mempunyai niat untuk menghuni di premis itu adalah tidak mencukupi dan taksa. Beliau seharusnya menyatakan dengan jelas sebagai satu fakta sama ada defendan sedang menghuni di premis itu ataupun tidak. Oleh kerana tidak terdapat pendapat yang jelas terhadap fakta itu oleh mahkamah perbicaraan, keterangan yang kukuh oleh defendan bahawa dia masih menghuni di premis itu tidak boleh diabaikan dan diragui (lihat ms 712I–713A); *Mercantile Bank of India (Trustees) Ltd v Ruth Nicholas* [1949] MLJ 104 diikut.

(4) Hakim perbicaraan telah terkeluar daripada batasan atas satu isu yang tidak dicerminkan di dalam pliding atau penghujahan pihak-

pihak itu. Beliau tidak seharusnya tidak menghiraukan pliding itu untuk mencapai satu kesimpulan yang mungkin difikirkan beliau adalah adil dan patut. Oleh demikian, perintah hakim itu membenarkan tuntutan plaintif di bawah s 16(1)(b) Akta itu tidak dibenarkan kekal dan harus dibatalkan juga (lihat ms 713I); *Madam Goh Gok Hoon v Eusuff Brothers Sdn Bhd & Ors* [1990] 1 CLJ 1167 dibeza; *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 dan *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 diikut.]

Notes

For cases with decisions based on non-pleaded issues, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2551–2554.

For cases on pleadings in a defence, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2560–2570.

For cases on recovery of posession of controlled premises due to the non-occupation by the tenant, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 515–528.

Cases referred to

Luang Bhasa Bheraj & Anor v Tan Kim Lean [1948] MLJ 78
Loh Chik San v Loh Chak Wan [1961] MLJ 255
Chong Khee Sang v Pang Ah Chee [1984] 1 MLJ 377
Champion Motors (M) Ltd v Leong Siew Kwan [1968] 2 MLJ 31
Mercantile Bank of India (Trustees) Ltd v Ruth Nicholas [1949] MLJ 104
Madam Goh Gok Hoon v Eusuff Brothers Sdn Bhd & Ors [1990] 1 CLJ 1167
Janagi v Ong Boon Kiat [1971] 2 MLJ 196
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152
Leong Chee Kum & Anor v Ng Ah Lau [1971] 1 MLJ 35

Legislation referred to

Control of Rent Act 1966 s 16(1)(b), (i), (5), (6)
Evidence Act 1950 s 58
Subordinate Courts Rules 1980 O 14 r 19(2)

Andrew Lim (*HS Lim & Malik*) for the appellant.
Benedict Cheang (*Benedict Cheang, Naziruddin & Co*) for the respondent.

Cur Adv Vult

Nik Hashim JC: This is an appeal by the defendant/appellant who is the tenant of controlled premises known as No 562-B, Jalan Temenggong, Kota Bharu against the judgment and order of the learned judge of the sessions court, Kota Bharu, granting possession of the premises to the plaintiff/ respondent, who is the owner and landlord of the premises.

The two-storey premises come within the purview of the Control of Rent Act 1966 and the plaintiff's claim is based on para (i) of s 16(1) of the

said Act. The plaintiff alleges that the defendant has not personally occupied the said premises for many years, nor has any member of his family. The plaintiff also alleges that the defendant has sublet the premises to one Siow Pan Kee. By para 5 of the statement of claim, the plaintiff has terminated the tenancy of the defendant on 30 September 1987 by a notice to quit dated 19 August 1987 and served on the plaintiff's solicitors on 29 August 1989.

The defendant, in his statement of defence, does not admit the termination of the tenancy and avers that the notice is invalid in law and of no legal effect whatsoever.

At the trial, the evidence was adduced through the plaintiff ('SP1') that a notice to quit was sent to the defendant by SP1's then solicitors, M/s HL Wrigglesworth & Co, giving the defendant three months' notice to vacate the premises. The notice was marked for identification as ID2, but was never produced as an exhibit. The trial judge decided on the facts that the notice had terminated the tenancy. He agreed with the submissions of learned counsel for the plaintiff that the defendant had not denied receiving the notice to quit, and by virtue of s 58 of the Evidence Act 1950, the notice need not be proved. Section 58 provides:

> (1) No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing or which before the hearing they agree to admit by any writing under their hands, or by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:
>
> Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

In my view, the non-admission of the termination of the tenancy as pleaded by the defendant in his statement of defence amounts to a traverse, which is a sufficient denial of the plaintiff's claim. His traverse is specific to the notice to quit which he claims to be invalid and of no legal effect. Therefore, I find that the traverse as pleaded is in order under O 14 of the Subordinate Courts Rules 1980 which requires, among other things, that the traverse may be made either expressly or by necessary implication: r 19(2). Since the defendant does not admit the termination and the tenancy could not have been determined through other means except by a notice to quit, the defendant could not by his own pleadings as such be said to have admitted the notice to terminate the tenancy. That being so, I hold that s 58 as submitted by learned counsel is not applicable to the facts of this case.

To recover possession of the premises, the landlord is required to determine the tenancy according to law: s 16(5). The first step is to serve a notice to quit: *Luang Bhasa Bharaj & Anor v Tan Kim Lean* [1948] MLJ 78; see also *Loh Chik San v Loh Chak Wan* [1961] MLJ 255.

In this case, the notice to quit ('ID2') was only shown to the plaintiff for identification while he was giving evidence and was not tendered as a documentary evidence. In my judgment, ID2 cannot be considered as a piece of evidence. To be admissible as such, it would have to be produced through the maker, ie M/s HL Wrigglesworth & Co. A document cannot

be admitted into evidence and marked as such until it is properly proved: *Chong Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377.

Since the notice to quit has not been proved by the plaintiff and it has not been proved to have been served on the defendant, his tenancy was never lawfully determined by the plaintiff and therefore the plaintiff cannot in law maintain any action for recovery of possession (see *Champion Motors (M) Ltd v Leong Siew Kwan* [1968] 2 MLJ 31). Indeed, on this ground alone, I consider it is sufficient for the appeal to be allowed.

However, there are two other grounds advanced by the defendant which, to my mind, merit consideration by the court.

The defendant in his evidence testified that he rented the premises since 1967 on monthly basis and there was no written agreement of the tenancy. With the knowledge of the plaintiff, the defendant sublet the front portion (15' x 50') of the premises to Siow Pan Kee from 1977 to 1986 and to Lai Tee Yoon from 1986 to 1988, whilst retaining the back portion (15' x 30') for his business in copper calligraphy. There are two rooms upstairs: one occupied by his brother-in-law while the other is used by him as a retreat for the weekends. However, he resides at a house No 1013-G Jalan Sultan Ibrahim, Kota Bharu since 1975.

The learned trial judge in his judgment held that:

> Mahkamah berpuas hati defendan atau ahli-ahli keluarganya tidak berniat untuk tinggal di premis itu ...
>
> Keterangan defendan yang mengatakan beliau masih menjalankan kerja-kerja logam adalah diragui.

The plaintiff's claim for recovery of possession is based on the provision of para (i) of section 16(1) which reads:

> (i) where neither the tenant nor any member of his family is personally in occupation of the controlled premises or any part thereof.

Encik Andrew Lim, learned counsel for the defendant, argued that based on the evidence, the defendant is still in occupation of the premises even though he does not live therein, and cited the case of *Mercantile Bank of India (Trustees) Ltd v Ruth Nicholas* [1949] MLJ 104 in support. With respect, I agree with his argument. The evidence shows that the defendant still uses a portion of the premises for his business, albeit a small one. He had registered the business in the name of Kee Sin Store of which he is the sole proprietor. In support, he produced a certificate of business ('D4'), a statement of bank account ('D3') and testified that a signboard bearing Kee Sin Store of 5" x 18" is still being displayed in front of the premises. Indeed, there is ample evidence on the balance of probability to show that the defendant is still in occupation of the premises and doing some business there. Even though the defendant does not reside therein, but by virtue of s 16(2) that he is still using the premises for his business, he is deemed to be in occupation of the premises. The defendant's evidence that he is using the premises for his business and weekend retreat remains unchallenged. The learned judge's finding that the defendant had no

A intention to stay at the premises is insufficient and ambiguous. He should go further and state clearly as a fact whether the defendant is in occupation of the premises or not. In the absence of a clear finding of fact by the trial court, the unshaken evidence of the defendant that he still occupies the premises for the purposes he testified, cannot be ignored and doubted. To hold otherwise would be against the weight of the evidence. Thus, in my B view, the finding of the learned trial judge in holding that the plaintiff had succeeded in proving his case under s 16(1)(i) is perverse and must be set aside.

The plaintiff at para 4 of his statement of claim also pleaded that the defendant sublet the premises to one Siaw Pan Kee at a rental of RM150 C per month. The defendant in his evidence did not deny the claim. But the learned judge on his own accord proceeded to hold that the defendant was in breach of the provision of s 20(1)(a) for failing to supply the plaintiff landlord with a written statement of the subletting, giving particulars of the occupancy, including the name of the subtenant and the rent charged, D and cited the case of *Madam Goh Gok Hoon v Eusuff Brothers Sdn Bhd & Ors* [1990] 1 CLJ 1167, and as such he allowed the plaintiff's case for repossession under s 16(1)(b) as well.

In *Madam Goh*'s case, the plaintiff relied specifically on breach of obligation under s 16(1)(b) as a ground to establish her case and she succeeded. Learned counsel for the defendant submitted that the plaintiff's E claim was not founded on breach of condition of tenancy by subletting, and since it was not pleaded as such the learned judge should not have decided the issue. Encik Benedict Cheang, learned counsel for the plaintiff, replied that the judge is entitled to raise any question of law for just decision of the case.

F On the duty of court to decide a case on issues pleaded, Sharma J in *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 at para G said:

> The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to G raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

H The above passage was quoted with approval by the Supreme Court in *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152.

The learned trial judge had strayed himself on an issue which was not reflected in the pleadings or submissions of the parties. It is not open to him to disregard the pleadings in order to reach a conclusion that he might have thought was just and proper. That being so, the order of the judge I allowing the plaintiff's claim under s 16(1)(b) cannot be allowed to stand and should also be set aside.

In the result, I allow the appeal. With regards to the question of costs s 16(6) provides:

In any proceedings for the recovery of possession of any premises except on the grounds set out in subsection (1)(a) no costs shall be awarded to either party to the proceedings:

Provided that if the court is of the opinion that either the landlord or the tenant has acted in an improper or unreasonable manner the court may order that the landlord or the tenant, as the case may be, shall pay the whole or part of such costs as it may think fit.

In the circumstances of this case it would be proper for the court to award costs against the respondent (landlord). Since learned counsel for the appellant (tenant) had indicated to waive costs, I order that there will be no order for costs (see *Leong Chee Kum & Anor v Ng Ah Lau* [1971] 1 MLJ 35).

Appeal allowed.

Reported by Ng Kian Pin